Judges of England; and if one counts in the years when he was a member of the Supreme Court of California, his judicial career is longer than Parke's had been, when, after having for many years given his opinions in the House of Lords as Lord Wensleydale, he died at the venerable age of eighty-five. Stephen J. Field has been one of the most active figures in the highest court of this country, than which no more important tribunal exists. Appointed by President Lincoln to this position during the stormy days of the war, he served through the no less critical time of the reconstruction of the Union, a period in which were brought before the Supreme Court questions more intimately concerning the life of the nation than any which had arisen since the time when the main principles of the Constitution had first to be expounded. And in the enormous number of judicial opinions written by him during all these years, it may be said that Mr. Justice Field has uniformly displayed independence of view, vigor of expression, and a high notion of the importance of his office. The same qualities of courage and energy which made him a leader of men in the stirring days of the settlement of California have made him always a prominent figure upon the bench where he sat so long.

TROVER FOR REAL ESTATE? — In the late Massachusetts case of *Rogers* v. *Barnes*, 47 N. E. Rep. 602, the plaintiff gave the defendant a mortgage of land conditioned on payment of the debt within a year. Before default, the defendant made a false affidavit of default, and conveyed under the power of sale to Reed, who reconveyed to the defendant. After the year, the mortgage debt being still unpaid, the defendant conveyed by warranty deed to Rice, an innocent purchaser, who got a clear record title. Plaintiff then sued defendant in tort for the value of the land. The court held that, even though Rice took subject to plaintiff's right to redeem, the defendant was liable, as the plaintiff had the option to follow the land or to recover the value from the defendant, thereby confirming the title in Rice. Allen, Holmes, and Knowlton, JJ., dissented. The court do not seem very clear as to the grounds of their decision. At first sight the decision seems to rest on a doctrine which would apply the rules of trover to any case of disseisin; but it is hardly to be presumed that the court intended to lay down such a principle; and the case should, therefore, be considered as relating solely to the law of mortgages.

Owing mainly to the loose use of terms, there is much uncertainty as to the nature of the interests of a mortgagee and a mortgagor. It seems clear, however, that in Massachusetts, before default, a mortgagee has a legal fee subject to a legal right in the mortgagor. *Holman* v. *Bailey*, 3 Met. 55. After default, a mortgagee has a legal fee subject to an equitable right in the mortgagor. 1 Jones on Mortgages, 5th ed., p. 25, note 1. The mortgage debt in this case not being paid when due, the plaintiff's right became equitable. The court admits that Rice held subject to plaintiff's equity. Under these circumstances, why should the plaintiff have such an option as is given him in this case?

Where personalty is converted, optional remedies are given because, as the property may be removed or destroyed, there is no certainty of recovering it. Where there is a breach of trust the *cestui* has optional remedies, because he may not get the property unless he proves notice. In the case in question the recovery of the property is certain if the plaintiff pro-

ceeds properly. The right to redeem, together with a claim against this defendant for slander of title, seems to be all that plaintiff needs; and the law does not create unnecessary remedies. Much of the reasoning which allows the option here would apply to the case of a disseisin, but a disseisee has no option. *Brigham* v. *Winchester*, 6 Met. 460, (not noticed by the court in this case). Directly opposed to *Rogers* v. *Barnes* is *Winslow* v. *Clark*, 47 N. Y. 261. As the court have not made their position clear, it is difficult to criticise the case, but the objections to it may be summed up by saying that it makes an innovation the extent and effect of which it is impossible to determine, and as a consequence renders the law of real property uncertain.[1]

LIBEL — CONFLICT OF LAWS. — In the case of *Machado* v. *Fontes* [1897] 2 Q. B. 231, the Court of Appeal has handed down a decision that is worthy of note. The court holds that if, while A and B are both in Brazil, A publish in regard to B an article which is not actionable according to Brazilian law, and which is not published in England, an action for libel may nevertheless be maintained by B against A in an English court. The cases cited, *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, and *The Moxham*, 1 P. D. 107, support the decision only by *dicta*. Putting aside the question of precedent, however, it is hard to see how the case can be supported on principle. It is a recognized doctrine of private international law, that the courts of one country will, generally speaking, enforce obligations arising under the laws of another sovereign state. Wharton, Conflict of Laws, §§ 393 *et seq.* This case goes much further. There is no obligation incurred here to be enforced; for by the law governing the parties at the time of the act complained of no right was created in favor of the plaintiff against the defendant. To attempt to sustain the case on the ground that the act would be a libel by English law, would be to encroach upon one of the fundamental principles of international law, that of the territorial sovereignty of independent states. Wharton, *supra*, § 477; *Cope* v. *Doherty*, 4 Kay & J. 367.

PRECATORY TRUSTS. — It is doubtful if there is any more striking example of mistaken kindness than the exceeding diligence with which courts of equity were formerly wont to find declarations of trust when in simple fact none such existed. In wills, for example, particular words were seized on as imposing a legal obligation, although their ordinary meaning implied something quite the contrary. The intention of the testator was correctly and universally held to be the test; but in discovering this intention courts of equity seem not infrequently to have fallen into an obvious error of simple logic. The question, of course, is not whether the testator intends his property to go in the way he recommends, but whether he means the first taker to be legally bound to carry out what is undoubtedly his desire. It is not suggested that the courts deliberately ignored this distinction, but it is apparent that they frequently failed to keep it precisely and clearly before them. *Harding*

[1] It may be proper to say that Professor Gray, who was counsel at an application for a rehearing in this case, is in no way responsible for the appearance of this note in the REVIEW. — ED.